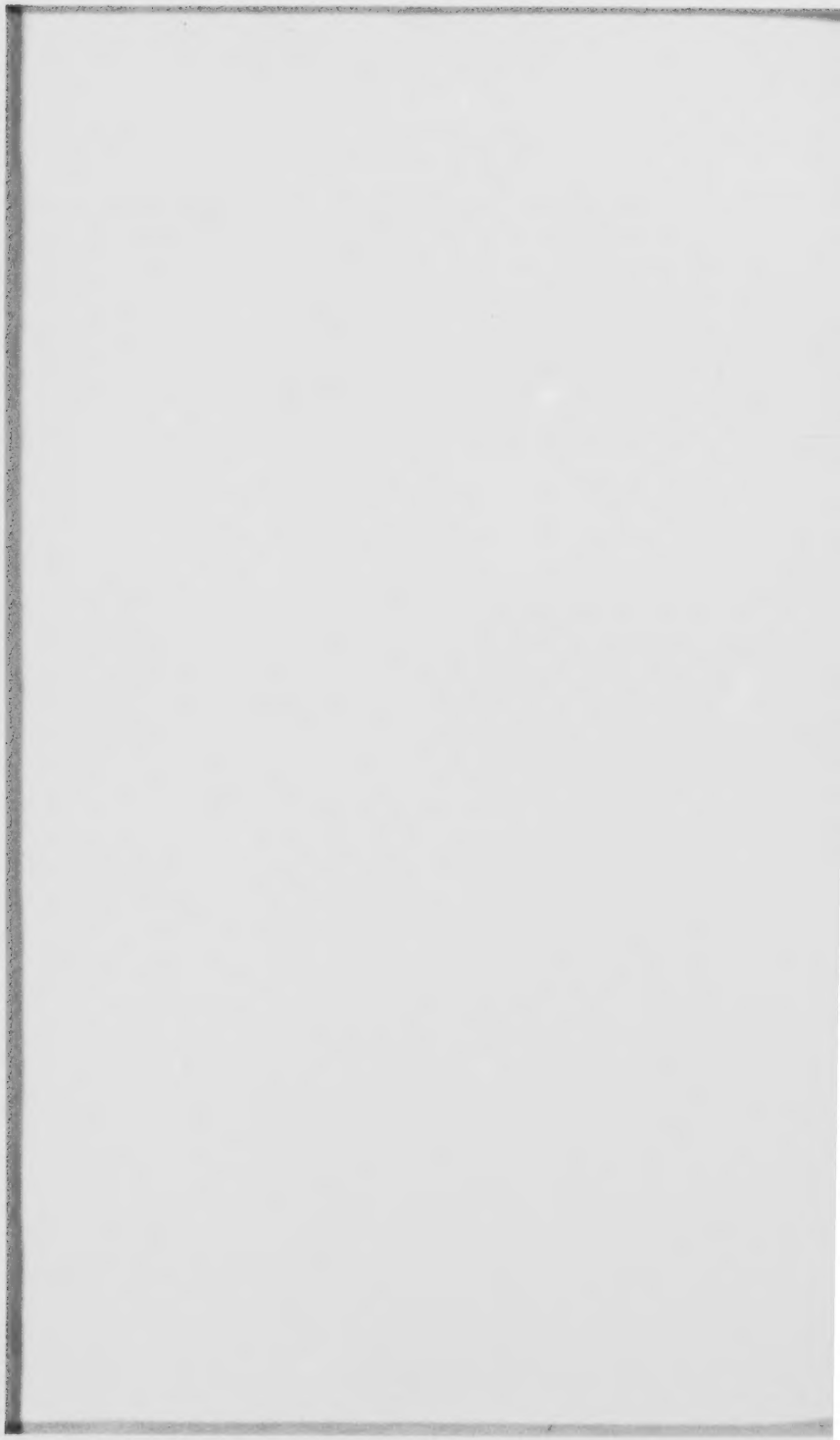

BRIEF IN SUPPORT OF PETITION.

Reference to the opinion below, jurisdiction, a statement of the questions presented, facts in this case, specifications of errors to be urged, and reasons for granting the writ, will be found in the foregoing petition. The statutes involved are set out in the Appendix, *infra*, pp. 14-16.

ARGUMENT.

The opinion of the Court of Claims disposes of this case and the case of *General Motors Corporation, (as transferee in complete liquidation of Walter J. Bemb, Inc.)* v. *The United States.* A separate record and petition in that case are being simultaneously filed herewith. The petition adopts, by reference, the argument as herein stated.

These two cases involve the constitutionality of Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934. The former was adopted on June 16, 1933, the latter on May 10, 1934. Both Sections impose an excise tax upon a corporate taxpayer with respect to doing business for any part of the year ending June 30, 1933 and 1934, respectively, of $1 for each $1,000 of the adjusted declared value of its capital stock. Said Section 215 exempted any corporation which did not do business during a part of the period from the date of the enactment of the N.I.R.A. (June 16, 1933) to June 30, 1933, and said Section 701 exempted any corporation which did not do business during part of the period from the date of the enactment of the Revenue Act of 1934 (May 10, 1934) to June 30, 1934. These Sections require the filing of returns for the first year, making a declaration of the value of a corporation's capital stock—and provided that such declared value could not be amended. For all subsequent years the adjusted declared value was to be

the original declared value, after making certain specified capital adjustments.

Sections 216 and 702 of said Acts, respectively, imposed for each income taxable year ending after the close of the first capital stock tax year, an excess-profits tax equivalent to five per centum of such portion of the corporation's income as was in excess of 12½ per centum of the adjusted declared value, determined as aforesaid.

Section 703 of the Revenue Act of 1934 provided that Section 215 of the N.I.R.A. shall not apply to any taxpayer in respect of any year, except the year ending June 30, 1933, and that Section 216 of the N.I.R.A. shall not apply to any taxpayer in respect of any taxable year ending after June 30, 1934.

"This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment." *Nichols* v. *Coolidge,* 274 U. S. 531.

The Court of Claims in this case held—"That no one was better qualified to place an estimate upon the value of the stock than the taxpayer itself * * *." In *Allied Agents* v. *United States,* 26 F. Supp. 98, the Court of Claims held that "the actual value is immaterial."

Assuming, that a taxpayer has no desire to avoid its just tax obligations and wishes to declare a fair value for it capital stock, we submit that there is no reasonable or fairly certain basis or standard for determining a value of capital stock for all time, as required by these Acts. A value for capital stock as determined in 1933 may be fair and reasonable at that time, but may be wholly arbitrary, unreasonable and unfair in 1934 and subsequent years. A value declared under Sections 215 of the N.I.R.A. and 701 of the Revenue Act of 1934, was binding upon the taxpayer for all time. The capital adjust-

ments required by said Acts have no reasonable relationship to value, and may readily run counter to changes in value. The privilege given by subsequent Congressional enactments to change the declaration of value made conclusively binding for all time in the prior Acts, does not render such prior Acts reasonable and constitutional. On the contrary, it is to some extent a recognition by Congress of the unreasonable nature of the requirements of such prior Acts. "The taxpayer may justly demand to know when and how he becomes liable for taxes. He cannot forsee, and ought not to be required to guess the outcome of pending measures." *Untermyer* v. *Anderson*, 276 U. S. 440.

The issue, therefore, is not whether the taxpayer is best qualified to make an estimate of the value of its capital stock for all time, but whether such a requirement is so unreasonable and arbitrary as to offend the Due Process Clause of the Fifth Amendment.

It is obvious that any declaration of value for all time cannot be based upon any of the underlying factors which the Courts have held must be taken into consideration in determining the value of capital stock. "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside that which results from such use." *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co.* v. *Backus*, 154 U. S. 439.

The Court of Claims in its opinion in this case said that—"The value of stock in a going and operating concern, is always based largely on an estimate of the amount of profit which it will make in future years." It cannot be denied, however, that such an estimate will vary materially from time to time, depending upon the economic conditions at the time of the estimate and of the several

preceding years. Obviously such an estimate, if made in 1929 (prior to the market crash) would be greatly different than such an estimate if made in 1932 and the estimate made in 1932 would be greatly different than that made in 1936.

Mr. Justice Holmes has said that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner,* 256 U. S. 345. The statistical tables submitted in this case (R. 22-29) prove, if any proof is needed, the tremendous fluctuations in the underlying economic factors determining value of capital stock. In 1929, General Motors common stock sold at a high of 91¾ and a low of 33½; in 1932 the high was 22⅝ and the low 7⅝, and in 1936 the hgih was 77 and the low 53⅞ (R. 29).

The financial history of this petitioner (R. 3-4) and of General Motors, its parent company (R. 12-13) shows similar tremendous fluctuations. We submit, therefore, that any declaration of value for all time cannot possibly have any reasonable relationship to any known or accepted standard for determining value, and that a tax imposed on such declaration of value is not only so unreasonable and arbitrary, as to be violative of the Fifth Amendment, but is also a direct tax imposed in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4 of the Constitution. *Levy* v. *Wardell,* 258 U. S. 542. "Taxes are very real things and statutes imposing them are estimated by practical results." *Nichols* v. *Coolidge, supra.* Also, *Farmers Loan and Trust Co.* v. *State of Minnesota,* 280 U. S. 204.

The Courts have uniformly held that there is no duty upon a taxpayer to so arrange its affairs as to pay the maximum tax. On the contrary, it is reasonable to assume that a taxpayer will within the law, seek to minimize its taxes.

Assuming, therefore, that the Acts in question, permit the taxpayer to declare any value for its capital stock regardless of actual or fair value, the capital stock tax provisions in question are unconstitutional, because when considered together with the excess-profits tax provisions of the said Acts in question, it is obvious that they compel the taxpayer to guess the future trend of its earnings for all time. The financial history of the petitioner and of the country during the nine year period from 1929 to 1937, as disclosed by the record in this case (R. 3-4; 12-13; 22-29), shows the utter impossibility of determining, with any reasonable degree of accuracy, the trend of future earnings.

The tremendous penalties which were imposed for a wrong guess as to future earnings is forcefully illustrated by this record. Based on the 1934 declarations, General Motors paid excess-profits taxes of $2,464,706.76, and its subsidiaries a total of $158,343.53 for 1935 (Schedule R. 10-11). The total amount of excess-profits taxes collected by the Government for the year ending June 30, 1935, was $6,560,000.00 (Report of the House Sub-Committee on Internal Revenue Taxation, Jan. 14, 1938, p. 57-58).

The necessity for raising revenue, preventing tax avoidance or the difficulty of administration, do not justify deprivation of constitutional rights. *Schlessinger* v. *Wisconsin*, 270 U. S. 230; *Heiner* v. *Donnan*, 285 U. S. 312. The case of *LaBelle Iron Works* v. *U. S.*, 256 U. S. 377, cited by the Court of Claims, is not applicable because there the tax was levied by reference to a readily determinable basis—invested capital. The complaint was only that in its operation it bore more heavily on some as compared with others. Here the liability is made to depend on a value required to be declared for all time, or on a guess as to future earnings. The admitted facts in this case show the unreasonable and arbitrary nature of either basis.

Retroactive Features of the Tax.

Under Section 215 of the N. I. R. A., a corporation which was engaged in business during the entire period from July 1, 1932, to June 15, 1933, and ceased doing business on the latter date, was not liable for any tax for the year ending June 30, 1933, whereas, a corporation which was organized and started doing business on June 30, 1933, was subject to the tax for the entire year. In *General Motors Corporation, Etc.,* v. *The United States,* where a petition for a Writ of Certiorari to the Court of Claims is being filed simultaneously herewith, the corporation was organized on May 5, 1933, started doing business on May 20, 1933, and was subjected to the capital stock tax for the entire tax year.

Under Section 701 of the Revenue Act of 1934, a corporation which did business during the entire period from July 1, 1933, to May 9, 1934, and ceased doing business on May 9, 1934, was not liable for any tax for the year ending June 30, 1934, whereas, a corporation which was organized and started doing business on June 30, 1934, was subject to the tax for the entire tax year. A period of sixteen days in one instance, and fifty days in the other, is by Congress declared to be a taxable year. We submit that the unreasonableness, arbitrary and discriminatory nature of the retroactive provisions of the Acts here in question, and the long period of retroactivity, render them unconstitutional. It is to be noted that the previous capital stock tax repealed in 1926 was applied prospectively and granted no discriminatory and unreasonable exemptions.

In *Hudson* v. *U. S.,* 12 F. Supp. 620; 13 F. Supp. 640, the Court of Claims in considering the question of the constitutionality of the "Silver Purchase Act" as an excise tax, said:

> "We think, putting these decisions together, it may be said that they hold in effect that if at the time a

citizen enters into a transaction it is not taxable and he has no reason to believe or expect a tax will in the future be imposed by reason of it, a valid tax thereon cannot be laid by subsequent Statute."

While this Court on appeal upheld the constitutionality of this Act, it did not deny the validity of the principle as thus stated by the Court of Claims. It sustained the Act on the ground that it imposed "a special income tax", and that the period of retroactivity (35 days) was not unreasonable.

U. S. v. *Hudson,* 299 U. S. 498. See also *Nichols* v. *Coolidge,* 274 U. S. 531;
Blodgett v. *Holden,* 275 U. S. 142; 276 U. S. 594;
Untermyer v. *Anderson,* 276 U. S. 440; *Lewellyn* v. *Frick,* 268 U. S. 238;
Schwab v. *Doyle,* 258 U. S. 529.

The retroactive application of the capital stock tax also destroys the character of the tax as one on privileges and so renders it invalid as an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution. *Milliken* v. *U. S.,* 283 U. S. 15; *Levy* v. *Wardell,* 258 U. S. 542.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the Court of Claims of the United States should be granted.

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